United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 76-4220

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BARTON MANUFACTURING CORP.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUE

Whether, because of the failure of the Company to file proper exceptions with the Board, the Board correctly adopted, pro forma, the Administrative Law Judge's conclusions that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employee Earl Thrane and by interrogating, threatening and warning employees about Union activity.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. § 151, et. seq.), for enforcement of its order issued on May 2, 1975, and reaffirmed on October 14, 1975, against Barton Manufacturing Corp. (the "Company").[1/] The Board's Decision and Order (A. 2-12, 19-22)[2/] was issued by a three-member panel of the Board consisting of Members Jenkins, Kennedy and Penello, and is reported at 217 NLRB 720. This Court has jurisdiction, the unfair labor practices having occurred in Freeport, New York.

I. THE BOARD'S FINDINGS OF FACT

Based on a complaint issued by the Board's General Counsel, a hearing was held in this case before a Board Administrative Law Judge on November 6 and 7, 1974 (A. 1). Subsequently, on January 31, 1975, the Judge issued his Decision finding that the Company violated Section 8(a)(3) and (1) of the Act by coercively interrogating its employees; by warning its employees to refrain from Union activity;

1/ Previously, by motion dated October 5, 1976, the Board had asked this Court for summary entry of a judgment enforcing its order in this case. By an order dated December 9, 1976, this Court (Circuit Judges Moore, Anderson and Feinberg) denied the Board's motion "without prejudice to go forward with enforcement proceedings." The instant proceeding then followed.

2/ "A." references are to the portions of the record printed as an appendix to the parties' briefs. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

by threatening its employees with loss of employment and other benefits if they engaged in Union activity; and by discharging employee Earl Thrane because of his activity in support of the Union. The Judge recommended that the Board issue its customary order in such a case which required, inter alia, that the Company reinstate Thrane with backpay (A. 2-12). On the same day, the Board's Executive Secretary also issued an order transferring the proceeding to the Board and fixing February 24, 1975, as the date by which "exceptions . . . must be received by the Board in Washington D.C." (A. 13). The Executive Secretary attached to his order excerpts from various sections of the Board's Rules including Section 102.48(a) which provides (A. 16):

> In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations of the administrative law judge as contained in his decision shall, pursuant to section 10(c) of the act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes. 3/

3/ Section 10(c) of the Act provides in part that:

> In case the evidence is presented . . . before an examiner . . . such examiner . . . shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Thereafter, Jon Emanuel, the Company's attorney, wrote the Board a letter, dated February 12, 1975, asking for a 60-day extension of time to file exceptions. The Board extended the time to March 11, 1975 (A. 1).

II. THE BOARD'S CONCLUSIONS AND ORDER

Because it did not receive any exceptions from the Company by March 11, 1975, the Board on May 2, 1975, adopted "pro forma" the Judge's conclusion that the Company violated the Act in the manner found by the Judge (A. 19, n. 2). The Board issued an order which requires the Company to cease and desist from the unfair labor practices found and from "in any other manner" infringing upon its employees' Section 7 rights. Affirmatively, the order directs the Company to reinstate Thrane with backpay and to post appropriate notices (A. 10-11, 20-22).

A week later, the Board received a letter from Company Counsel Emanuel dated May 11, 1975, stating that he had in fact mailed the Board exceptions "over two months ago." Accompanying the letter was the affidavit of Gloria Gonzales who asserted that on February 13, 1975, she mailed exceptions to the Board (A. 23-24). Emanuel did not, however, enclose a copy of the exceptions. The Board wrote Emanuel a letter noting that he had not shown proof of service on the other parties. A month later Emanuel sent the Board an affidavit of his own stating that he had observed his secretary mail copies of his "letter to the Executive Secretary, dated the 13th day of February, 1975," to the various parties (A. 25-26).

On September 17, 1975, the Board wrote a letter to Emanuel and the other parties reciting the events of the case and stating that the Board had been administratively advised that Counsel for the General Counsel had

timely received a carbon copy of the Company's exceptions, although the other parties had not. The Board then stated that it had decided to accept the Company's exceptions and consider the case on the merits, "provided sufficient and proper copies of such exceptions are received in Washington, D.C., on or before September 25, 1975" (A.. 27-28). However, no such exceptions were ever received by the Board and on October 14, 1975, the Board entered an order reaffirming its previous Decision and Order of May 2, 1975 (A. 29).

ARGUMENT

THE BOARD, BECAUSE OF THE FAILURE OF THE COMPANY TO FILE PROPER EXCEPTIONS WITH THE BOARD, CORRECTLY ADOPTED, PRO FORMA, THE ADMINISTRATIVE LAW JUDGE'S CONCLUSIONS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCRIMINATORILY DISCHARGING EMPLOYEE EARL THRANE AND BY INTERROGATING, THREATENING, AND WARNING EMPLOYEES ABOUT UNION ACTIVITY

As set out supra, p. 3, Section 10(c) of the Act provides that a party against whom an Administrative Law Judge makes adverse findings must file any exceptions to those findings with the Board within 20 days, or such additional time period as the Board may authorize. The Act and the Board's Rules further provide that if exceptions are not timely filed, the Board will automatically adopt the Judge's decision as its own and that any such exceptions will be deemed waived. And Section 10(e) of the Act provides, in part, that in an enforcement proceeding in the court of appeals, "no objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such exception shall be excused

because of extraordinary circumstances." It is well settled that, where exceptions are never filed or are untimely, these provisions of the statute and the Board's Rules justify pro forma adoption by the Board of a Judge's Decision and Order and preclude review by the appellate court of that action. See N.L.R.B. v. Ochoa Fertilizer Corp., 368 U.S. 318, 322-323 (1961), and cases cited; N.L.R.B. v. Newton-New Haven Company, 506 F.2d 1035, 1038 (C.A. 2, 1974); Retired Persons Pharmacy v. N.L.R.B., 519 F.2d 486, 493-494 (C.A. 2, 1975). Mistake or neglect on the part of counsel is not an "extraordinary circumstance" which would excuse such an omission. See N.L.R.B. v. Izzi, 343 F. 2d 753, 754-755 (C.A. 1, 1965); N.L.R.B. v. Ferraro's Bakery, Inc., 353 F. 2d 366, 367-368 (C.A. 6, 1965).

In the present case, the facts set forth supra, pp. 4-5, show that after the Judge issued his adverse decision, the Board never received any exceptions from the Company and, accordingly, issued its own decision adopting, pro forma, the Judge's decision. Subsequently, Company Counsel filed affidavits asserting that he had mailed timely exceptions to the Board, even though the Board did not receive them. Based on Counsel's sworn statements, the Board decided to rescind its prior decision, provided that the Company supplied proper copies of the exceptions, an action which it had still failed to do. 4/ Counsel nonetheless did not take advantage of

4/ 29 C.F.R., Section 102.46(a) specifically requires filing of exceptions "with the Board in Washington, D.C." (A. 15). Obviously, service on the General Counsel only is not the equivalent of proper service on the Board, particularly where, as here, the General Counsel occupies an adversarial role in the case before the Board.

the Board's offer and the Board accordingly reaffirmed its earlier pro forma adoption of the Judge's decision. Under the principles and precedents set out above, the Board's action is plainly correct and enforcement of the Board's order is warranted.

In its answer to the Board's application and in its response to the Board's original motion for summary enforcement, the Company did not dispute the fact that it never filed any exceptions with the Board. Rather, it sought to re-argue the merits of the Judge's findings and contended that, in any event, the reinstatement and backpay order with respect to Thrane should not be enforced because Thrane, after issuance of the Board's Decision, refused reinstatement and accepted a cash settlement and because he is presently incarcerated.

Neither argument warrants denial of the enforcement application. As to the merits of the case, as we have already shown, the failure of the Company to file exceptions precludes review of the Judge's findings by this Court. And the alleged events concerning Thrane took place--if at all--subsequent to the hearing in this case and accordingly were not litigated at that hearing. They are the kinds of matters which the Board ordinarily resolves in a supplementary compliance proceeding conducted after vindication of the Board's unfair labor practice findings. This consistent practice of the Board was long ago approved by this Court in N.L.R.B. v. New York Merchandise Co., Inc., 134 F. 2d 949 (C.A. 2, 1943), in the following language (per L. Hand J.; 134 F. 2d at 951, 952):

> It has been, as we understand, the custom of the Board not to consider the amount of backpay until its order has been affirmed or "enforced"; and we approved of this course in Marlin-Rockwell v. N.L.R.B., 2 Cir., 133 F. 2d 258. It is obviously convenient to wait until the question of unlawful discrimination has been definitively settled either by an order of the court or otherwise, before the Board takes up the amount of backpay, for its decision will turn out to be moot so far as its order is reversed . . . . [T]he same reasons which justify deferring the liquidation of backpay, apply with equal force to reinstatement . . . . [S]o far as [the Board's] order grants that relief, it is to be interpreted as meaning no more than that reinstatement--like backpay--is a remedy appropriate to restore the situation to that which the law demands; but it leaves for future decision whether if the employee had not been discharged, he would have kept his job to the date of the order; or if not till then, how long he would have kept it.

Accord: N.L.R.B. v. C.C.C. Associates, Inc., 306 F. 2d 534, 539 (C.A. 2, 1962); N.L.R.B. v. Dazzo Products, Inc., 358 F. 136, 138 (C.A. 2, 1966).

On this enforcement application, then, the Court should not undertake to determine the merits of the Company's claims concerning the reinstatement of Thrane, for "these objections do not go to enforcement." N.L.R.B. v. Dazzo Products, Inc., supra, 358 F. 2d at 138. Rather, the Court should enforce the Board's order in its present form. Such matters will later be considered by the Board in the compliance proceeding where the Company will have an opportunity to prove its claim that reinstatement is no longer appropriate for Thrane and how much backpay, if any, he is due. And if the Company disagrees with whatever determination the

Board reaches in that proceeding, it will, of course, have the right to seek further review of such conclusions in this Court on a proper record. See in general N.L.R.B. v. Mastro Plastics Corp., 354 F. 2d 170 (C.A. 2, 1965), cert denied, 384 U.S. 972.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter a judgment enforcing the Board's order in full.

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March 1977.

UNITED STATES COURT OF APPEALS

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies each of the brief and appendix in the above-captioned case have this day been served by first calss mail upon the following counsel at the addresses listed below:

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Dated at Washington, D.C.

this 8th day of March, 1977.